Supreme Court, U.S.
FILED
95 1108 JAN 2 1996
OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

MELIANA DENIKOV, BOBAN SAROV,
and LELA SAROV,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition for Writ of Certiorari to the
Appellate Court of Illinois
Fifth District

PETITION FOR WRIT OF CERTIORARI

FREDERICK F. COHN
205 W. Wacker Drive
Chicago, Illinois 60606
(312) 641-0692
Attorney for Petitioners

81pp

(1a) QUESTION PRESENTED

1. Are the due process rights of the defendants denied where the Appellate Court erroneously expanded the nature and scope of the conspiracy charged, based upon the overt acts alleged, and thereby permitted imposition of convictions and sentences for both the inchoate offense (conspiracy to commit theft and burglary) and the principal offense (burglary)?

(1b) PARTIES INVOLVED [per Rule 21.1(b)]

Petitioners, Meliana Denikov, Boban Sarov, and Lela Sarov, were the defendants in the Circuit Court for the Third Judicial Circuit, Bond County, appellants in the Appellate Court of Illinois, Fifth Judicial District, and petitioners in the Supreme Court of Illinois.

Respondent, People of the State of Illinois, was the plaintiff in the Circuit Court, appellee in the Appellate Court of Illinois, and respondent in the Supreme Court of Illinois.

(1c) TABLE OF CONTENTS

PAGE

Question Presented i

Parties Involved ii

Table of Contents iii

Judgment Below v

Table of Authorities vi

Prayer for Certiorari. 1

Judgment and Opinion Below 2

Jurisdictional Statement 3

Constitutional Provision 4

Statement of the Case 5

Statement of Facts 7

Raising the Federal Question Below . 10

Reason for Granting Certiorari . . . 12

1. Defendants' due process rights were denied where the Appellate Court erroneously expanded the nature and scope of the conspiracy charged, based upon the overt acts alleged, and thereby

permitted imposition of convictions and sentences for both the inchoate offense (conspiracy to commit theft and burglary) and the principal offense (burglary). Certiorari should be granted for this Court to clarify that a one cannot constitutionally be convicted of and sentenced for an offense other than that charged 12

Conclusion 18

Appendices:

A. Illinois Appellate Court "Rule 23 Order," No. 5-94-0098, dated April 4, 1995. . . . . App. 1

B. Illinois Appellate Court Order denying rehearing, No. 5-94-0098, dated April 28, 1995. . App. 52

C. Illinois Supreme Court Order, denying petition for leave

to appeal, No. 79088, dated
October 4, 1995..... App. 54

(1d) Judgment Below

The Rule 23 Order of the Appellate Court of Illinois, No. 5-94-0098, dated April 4, 1995, is attached as Appendix A to this Petition. It is not reported.

TABLE OF AUTHORITIES

PAGE

CASES

Cole v. Arkansas, 333 U.S. 196,
92 L.Ed. 644 (1948)..... 11, 13, 17

Ex Parte Bain, 121 U.S. 1,
30 L.Ed. 849 (1887)..... 11, 12, 17

Stirone v. United States,
361 U.S. 212,
4 L.Ed.2d 252 (1960)....11, 12-13, 17

Jackson v. Virginia, 443 U.S. 307,
61 L.Ed.2d 560 (1979).....11, 13, 17

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Fourteenth Amendment, U.S. Const.
(due process clause) . 5, 12, 13, 17

28 U.S.C. 1257(a) 3

Supreme Court Rule 10.1 3

Supreme Court Rule 12.1 3

Supreme Court Rule 13.1 3

Chap. 38, Ill.Rev.Stat. § 8-2. 5

Chap. 38, Ill.Rev.Stat. § 8-4. .5, 9, 16

Chap. 38, Ill.Rev.Stat.
§ 16-1(a)(1)(A) 5, 9, 16

Chap. 38, Ill.Rev.Stat. § 19-1 .5, 8, 15

720 ILCS 5/8-5 14

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

No.

MELIANA DENIKOV, BOBAN SAROV and LELA SAROV,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, Fifth District

---

Petitioners, Meliana Denikov, Boban Sarov, and Lela Sarov, (hereafter, petitioners, or defendants), pray that a Writ of Certiorari issue to review the judgment of the Appellate Court of

Illinois, 5th District, affirming the judgment (conviction and sentence) of the Circuit Court for the Third Judicial Circuit, Bond County, Illinois.

Judgment and Opinion Below

The Rule 23 Order of the Illinois Appellate Court, Fifth District, dated April 4, 1995, is set out as App. A (App. 1); it is not reported.

The Order of the Appellate Court, Fifth District, dated April 28, 1995, denying rehearing, is set out as App. B. (App. 52)

The Order of the Supreme Court of Illinois denying petition for leave to appeal, No. 79088, dated October 4, 1995, is set out as App. C. (App. 54)

Jurisdictional Statement

On April 4, 1995, the Appellate Court of Illinois, Fifth Judicial District, (App. A) affirmed the judgment of the Circuit Court. Timely-filed Petition for Rehearing was denied on April 28, 1995. (App. B) Petition for Leave to Appeal to the Supreme Court of Illinois, No. 79088, was denied on October 4, 1995. (App. C)

This Petition for Certiorari is timely filed within 90 days thereafter.

Jurisdiction is invoked under 28 U.S.C. Sec. 1257(a) and Rules 10.1, 12.1 and 13.1 of this Court.

Constitutional Provisions

The Fourteenth Amendment to the U.S. Constitution (due process clause) provides, in pertinent part:

> "Section 1 ... No State shall ... deprive any person of life, liberty, or property, without due process of law; ..."

STATEMENT OF THE CASE

Defendants were charged by information in the Circuit Court of Bond County, Illinois, with (Count I) theft of property of CC's Food Mart, Greenville, Illinois, in violation of Chap. 38, Ill.Rev.Stat. § 16-1(a)(A), a class 3 felony; (Count II) burglary of the same establishment with intent to commit theft therein, in violation of Chap. 38, Ill.Rev.Stat. § 19-1, a class 2 felony; (Count III) conspiracy to commit offenses against the People of the State of Illinois, that is, theft as alleged in Counts I and II, and to conceal same, in violation of Chap. 38, Ill.Rev.Stat. §§ 16-1(a)(1)(A), 8-4, and 8-2, a Class 4 felony. The Information is set out in detail in the affirming

Order of the Appellate Court, App. A, pp. App. 1-11.

Following a bench trial, defendants were convicted and sentenced as follows: Meliana Denikov was convicted on counts II (5 years' imprisonment) and III (e years' imprisonment), sentences to run consecutively; Boban Sarov was convicted on Counts II (4 years) and III (3 years), to run consecutively, and fined $5,000 on each count plus court costs; and Lela Sarov was convicted on Counts II (4 years) and III (3 years), consecutively, and fined $1,000 on each count plus court costs.

On appeal, the Appellate Court affirmed the convictions and sentences, in an opinion (App. A), the rationale of which is to expand and alter the scope

of the conspiracy charge from that in the charging instrument.

Statement of Facts

Here, the charging document for Counts II and III related to and was limited to a conspiracy to commit (Count III) theft on February 23, 1992 at CC's Food Mart, and burglary of said CC's Food Mart on February 23, 1992. Count II charges a burglary--[entered or remained within a building ... with intent to commit theft]--as follows:

> "On **February 23, 1992**, in Bond County, Illinois, the defendants **Meliana Denikov**[,] **Boban Sarov** and **Lela Sarov** did commit the offense of **burglary** in that the said defendants without authority, **knowingly** **entered or remained** **within a building** of another person, to wit, **CC's Food mart, Greenville, Illinois,** **with the intent to commit**

> **therein, a theft**, in violation of Chapter 38, Illinois Revised Statutes, Section 19-1. A Class 2 felony." (Information, Count II; Emphases added.)

Count III charges those same three named defendants, together with four other defendants, with conspiracy to commit theft--including **precisely** the same allegations as the burglary charged in Count II.

More particularly, Count III, par. 2 alleges *(inter alia)*:

> "Between on or about February 22, 1992 and February 24, 1992 in Bond County, Illinois and elsewhere, [7 named] defendants ... did knowingly and willfully combine, **conspire**, confederate **and agree** together and with each other and with other persons to the authorities known and unknown, **to commit offenses** against the People of the State of Illinois, that is:

> "To knowingly obtain, unauthorized control over property of others with intent to deprive the individuals permanently of the use and benefit of said property, in violation of Chapter 38, Illinois Revised Statutes, Sections 16-1(a)(1)(A) and 8-4, **as more fully set forth in Counts** I and **II and which the People reallege and incorporate herein**, and did conspire to conceal said deprivations of property." (Emphasis added.)

That is, in Count III, par. 2, as just quoted, Count III expressly and specifically incorporates and realleges exactly, the allegations of Count II. Because of the incorporation, the conspiracy was the inchoate offense to the principal offense--burglary.

The evidentiary facts adduced at trial are fully set out in the affirming Appellate Court Rule 23 Order (App. A),

not repeated here to avoid unnecessary duplication.

RAISING THE FEDERAL QUESTION BELOW

In their appeal, defendants argued (*inter alia*) that their convictions and consecutive sentences violated due process because the object of the conspiracy (Count III) was the same as the substantive offenses in Counts I and II.

In affirming, the Appellate Court (see App. A) expanded the nature and scope of the conspiracy charged, based upon the overt acts alleged.

In their Petition for Rehearing, defendants argued that their rights to due process of law were denied by this affirming Appellate Court order, and cited in support of the proposition that

"A defendant cannot constitutionally, consistent with due process of law, be tried on charged not made in the charging instrument," this Court's constitutionally-based decisions in Ex Parte Bain, 121 U.S. 1, 30 L.Ed. 849 (1887), Stirone v. United States, 361 U.S. 212, 4 L.Ed.2d 252 (1960), Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560 (1979), and Cole v. Arkansas, 333 U.S. 196, 92 L.Ed. 644 (1948). (Petition for Rehearing, No. 5-94-0098, pp. 1-2) Rehearing was denied. (App. B)

The same constitutional contention and authorities were presented in defendants' Petition for Leave to Appeal to the Illinois Supreme Court, No. 79088, which was denied. (App. C)

REASON FOR GRANTING CERTIORARI

1.

The due process rights of defendants were violated when the Appellate Court erroneously expanded the nature and scope of the conspiracy, based upon the overt acts alleged, and thereby permitted imposition of convictions for both the inchoate offense (conspiracy to commit theft and burglary) and the principal offense (burglary).

Certiorari should be granted for this Court to clarify that a one cannot constitutionally be convicted of and sentenced for an offense other than that charged.

A defendant cannot constitutionally, consistent with due process of law, be tried, convicted and sentenced on charges not made in the charging instrument. Ex Parte Bain, 121 U.S. 1, 30 L.Ed. 849 (1887); accord, Stirone v. United States, 361 U.S. 212, 4 L.Ed.2d 252 (1960) (fatal, constitutional error

to find defendant guilty on theory not made in charging instrument). In Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560 (1979), this Court stated that a conviction based on a charge not made, violates due process of law.

In Cole v. Arkansas, 333 U.S. 196, 92 L.Ed. 644 (1948), this Court held:

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. * * * It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." 333 U.S. at 201.

Here, compliance with this constitutionally-mandated principle

would have prevented, under application of Illinois statute, the defendants being convicted and separately sentenced for the offenses of burglary and conspiracy to commit the exact same burglary. Under Illinois statute, 720 ILCS 5/8-5, one cannot be convicted of an inchoate offense if one is convicted of the primary offense. It reads:

> "No person shall be convicted of both the inchoate and the principal offense."

Here, the charging document for Counts II and III related to and was limited to a conspiracy to commit (Count III) theft on February 23, 1992 at CC's Food Mart, and burglary of said CC's Food Mart on February 23, 1992. Count II charges a burglary--[entered or remained within a building ... with

intent to commit theft]--as follows:

> "On February 23, 1992, in Bond County, Illinois, the defendants Meliana Denikov[,] Boban Sarov and Lela Sarov did commit the offense of burglary in that the said defendants without authority, knowingly entered or remained within a building of another person, to wit, CC's Food mart, Greenville, Illinois, with the intent to commit therein, a theft, in violation of Chapter 38, Illinois Revised Statutes, Section 19-1. A Class 2 felony." (Information, Count II; Emphases added.)

Count III charges those same three named defendants, together with four other defendants, with conspiracy to commit theft--including precisely the same allegations as the burglary charged in Count II.

More particularly, Count III, par. 2 alleges *(inter alia)*:

> "Between on or about February 22, 1992 and February 24, 1992 in Bond

> County, Illinois and elsewhere, [7 named] defendants ... did knowingly and willfully combine, **conspire**, confederate **and agree** together and with each other and with other persons to the authorities known and unknown, **to commit offenses** against the People of the State of Illinois, that is:
>
> > "To knowingly obtain, unauthorized control over property of others with intent to deprive the individuals permanently of the use and benefit of said property, in violation of Chapter 38, Illinois Revised Statutes, Sections 16-1(a)(1)(A) and 8-4, **as more fully set forth in Counts** I and **II and which the People reallege and incorporate herein**, and did conspire to conceal said deprivations of property." (Emphasis added.)

That is, in Count III, par. 2, as just quoted, Count III expressly and specifically incorporates and realleges exactly, the allegations of Count II. Because of the incorporation, the

conspiracy was the inchoate offense to the principal offense--burglary. Hence, under 720 ILCS 5/8-5, defendants could not be convicted of both. (See p. 14, supra.)

Here, the State trial court and Appellate Court violated the defendants' constitutional rights by holding that the allegation of overt acts in the conspiracy charge broadened the conspiracy charge. This holding violates the principles that defendant cannot be tried, convicted and sentenced for an offense for which he was not charged. Bain, Stirone, Jackson v. Virginia, Cole v. Arkansas - all, supra.

The Illinois courts' utter disregard for this salutary, controlling due process principle, should be scrutinized

by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

FREDERICK F. COHN
Attorney for
Petitioners

APPENDICES

APPENDIX A

F I L E D
APR 4 1995
LOUIS E. COSTA
CLERK APPELLATE COURT 5th DIST.

NO. 5-94-0098

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of
Plaintiff-Appellee,	)	Bond County.
	)	No. 92-CF-23
MELIANA DENIKOV, BOBAN SAROV, LELA SAROV, SILVA KUZNIKOV, LIZA KUZNIKOV, TOMA KUZNIKOV, and ANTAL KOROTKOV,	)	Honorable J. Lawrence Keshner, Judge, presiding.
Defendants-Appellants.	)	

R U L E 2 3 O R D E R

On April 13, 1992, defendants, Meliana Denikov, Boban Sarov, Lela

Sarov, Silva Kuznikov, Liza Kuznikov, Toma Kuznikov, and Antal Korotkov, were charged by information in the circuit court of Bond County. In relevant part, the information alleged:

"COUNT I

On February 23, 1992, in Bond County, Illinois, the Defendants, Meliana Denikov, Boban Sarov, and Lela Sarov did commit the offense of THEFT in that the said defendants did knowingly obtained *[sic]* unauthorized control over property of CC's Food Mart, Greenville, Illinois having a total value in excess of $300.00, (approximately $5,205.63 in cash and checks) intending to deprive CC's Food Mart permanently of the use and benefit of said *[page 2]* property. In violation of Chapter 38, Illinois

Revised Statutes, Section 16-1 (a) (A) [(now 720 ILCS 5/16-1(a)(A) (West 1992))]. A Class 3 felony.

COUNT II

On February 23, 1992, in Bond County, Illinois, the defendants Meliana Denikov[,] Boban Sarov, and Lela Sarov did commit the offense of burglary, in that said defendants without authority, knowingly entered or remained within a building of another person, to wit, CC's Food mart *[sic]*, Greenville, Illinois, with the intent to commit therein, a theft, in violation of Chapter 38, Illinois Revised Statutes, Section 19-1 [(now 720 ILCS 5/19-1 (West 1992))]. A Class 2 Felony.

COUNT III

1. At all times material herein,

defendants, [Meliana Denikov, Boban Sarov, Lela Sarov, Silva Kuznikov, Toma Kuznikov, Liza Kuznikov, and Anatal Korotkov] traveled together in Illinois *** in several vehicles including but not limited to a black Chevrolet Lumina, Illinois license plate #XXT993, a Ford Crown Victoria, Illinois license plate #ZMV174, a Ford Taurus, Illinois license plate #XXT250, and a grey Pontiac Bonneville, Illinois license plate #YRZ467.

2. Between on or about February 22, 1992 and February 24, 1992 in Bond County, Illinois, and elsewhere, defendants [Meliana Denikov, Boban Sarov, Lela *[page 3]* Sarov, Silva Kuznikov, Toma Kuznikov, Liza Kuznikov, and Anatal Korotkov] did knowingly and

willfully combine, conspire, confederate and agree together and with each other and with other persons to the authorities known and unknown, to commit offenses against the People of the State of Illinois, that is:

> To knowingly obtain[] unauthorized control over property of others with intent to deprive the individuals permanently of the use and benefit of said property, in violation of Chapter 38, Illinois Revised Statutes, Sections 16-1(a)(1)(A) and 8-4 [(now 720 ILCS 5/16-1(a)(1)(A), 8-4 (West 1992))] as more fully set forth in Counts I and II and which the People reallege and incorporate herein, and did conspire to conceal said

deprivations of property.

3. It was part of said conspiracy, scheme and deception:

(a) That the defendants would drive through towns and cities in Bond County, Illinois and elsewhere attempting to identify convenience stores with few employees or clerks in attendance;

(b) That said defendants upon locating such a store would gather into pairs or singly enter said store at approximately the same time; *[page 4]*

(c) That once inside a store, the defendants would create a diversion for store personnel and customers in an attempt to cause store personnel to leave the store office cash and proceeds unattended for a brief time;

(d) While the attention of store personnel and customers was diverted, other defendants or juveniles traveling with said defendants would enter the store office and safe and steal cash, checks and store proceeds and property; [and]

(e) Once the theft had occurred, one of the defendants would signal, and the remaining defendants would leave the store and flee the area.

OVERT ACTS

3.*[sic]* In furtherance of the above conspiracy, scheme, and deception, and in order to effect and accomplish its objectives, the defendants did commit, among others, the following acts in Bond County and elsewhere:

(a) On February 22, 1992, at

approximately 3:05 p.m. the defendants did arrive in vehicles at the Casey IGA Store in Casey, Clark County, Illinois where they did divert the attention of employees and pry open a desk in the store office and remove approximately $711.00;

(b) On February 22, 1992, at approximately 5:00 p.m., the defendants did arrive in vehicles at the Odin Convenience Store in Odin, Marion County, Illinois where *[page 5]* they did divert the attention of employees and remove approximately $500.00 from the store;

(c) On February 22, 1992, said defendants spent the night at the Fairview Heights Drury Inn, St. Clair County, Illinois;

(d) On February 23, 1992, at approximately 8:45 a.m., said defendants did arrive in vehicles at the CC Food Mart in O'Fallon, St. Clair County, Illinois and did enter the premises;

(e) On February 23, 1992, at approximately 9:25 a.m. said defendants did arrive in vehicles at the Sander's AG Market in Freeburg, St. Clair County, Illinois and did enter the premises;

(f) On February 23, 1992 at approximately 12:50 p.m., said defendants did arrive in vehicles at the CC Handy Mart Convenience Store in Greenville, Bond County, Illinois;

(g) That once inside the CC Handy Mart in Greenville, defendant Meliana Denikov did distract the store clerk while Lela Sarov and Boban Sarov did

enter the store office and remove cash and checks from the office;

(h) On February 23, 1992 at approximately 4:00 p.m. said defendants did arrive in vehicles at the Arcola Shell Gas Convenience Store in Arcola, Douglas County, Illinois and did remove approximately $1,560 in currency *[page 6]* from the premises;

(i) On February 23, 1992, said defendants spent the night at the Super 8 Motel in Fairview Heights;

(j) On February 24, 1992 at approximately 8:40 a.m. said defendants did arrive in vehicles at the S & M Quik Shop in O'Fallon, St. Clair County, Illinois and did remove approximately $1,334 in currency from the office on the premises; [and]

(k) The defendants did then flee the area in the same automobiles.

All in violation of Chapter 38, Illinois Revised Statutes, Sections 16-1(a)(1)(A), 8-4, and 8-2 ((now 720 ILCS 5/16-1(a)(1)(A), 8-4, 8-2 (West 1992))]. A Class 4 Felony."

Following a bench trial, the defendants were convicted and sentenced as follows:

(1) Meliana Denikov was convicted on counts II (five years' imprisonment) and III (three years' imprisonment), sentences to run consecutively;

(2) Boban Sarov was convicted on counts II (four years' imprisonment) and III (three years' imprisonment), sentences to run consecutively, and fined $5,000 on each count plus court

costs;

(3) Lela Sarov was convicted on counts II (four years' imprisonment) and III (three years' imprisonment), sentences to run consecutively, and fined $1,000 on each count plus court costs;

(4) Silva Kuznikov was convicted on count III (three years' *[page 7]* imprisonment) and fined $10,000 plus court costs;

(5) Liza Kuznikov was convicted on count III (three years' imprisonment) and fined $2,000 plus court costs;

(6) Toma Kuznikov was convicted on count III (three years' imprisonment and fined $10,000 plus court costs; and

(7) Antal Korotkov was convicted on count III (three years'

imprisonment).

Defendants raise the following issues for our review: (1) whether the sentences imposed upon Meliana Denikov, Boban Sarov, and Lela Sarov for conspiracy as charged in, Count III are improper "where the defendants were also convicted of the burglary that was the subject of conspiracy"; (2) whether imposition of consecutive sentences upon Meliana Denikov, Boban Sarov, and Lela Sarov is improper; (3) whether the evidence as to each defendant is sufficient to sustain a conviction; and (4) whether the conviction of Boban Sarov must be reversed where the trial court considered evidence allegedly obtained in violation of the fourth amendment.

To avoid unnecessary factual duplication, pertinent facts will be set forth in connection with our analyses of the issues.

I. *Propriety of the Convictions and Sentences imposed Upon Meliana Denikov, Boban Sarov, and Lela Sarov Under Counts II and III of the Information*

The information charging the defendants contains three counts. Count I charges Meliana Denikov, Boban Sarov, and Lela Sarov with having committed the offense of theft at the CC Food Mart in Greenville. (720 ILCS 5/16-1(a)(1)(A) (West 1992).) Count II charges the same three defendants with having committed the offense *[page 8]* of burglary at the CC Food Mart in Greenville. (720 ILCS 5/19-1 (West 1992).) Count III charges all seven defendants with *conspiracy to*

commit theft. 720 ILCS 5/16-1(a)(1)(A) (West 1992).

Defendants nonetheless assert that "the burglary charged in Count II *** is the object of the conspiracy charged in Count III." This assertion is erroneous given that Count III plainly alleges that the seven defendants conspired to commit theft, not burglary. Count III states with clarity that the seven defendants conspired to

> "knowingly obtain[] unauthorized control over the property of others with intent to deprive the individuals permanently of the use and benefit of said property in violation of [720 ILCS 5/16-1(a)(1)(A) (West 1992)], as more fully set forth in Counts I and II

and which the People reallege and incorporate herein ***."

Defendants' reliance on the black-letter rule of law that a person cannot be convicted of both an inchoate offense and the principal offense (720 ILCS 5/8-5 (West 1992); *People v. Negron* (1991), 220 Ill. App. 3d 754, 772, 580 N.E.2d 1301, 1314; *People v. Jackson* (1986), 145 Ill. App. 3d 626, 647, 495 N.E.2d 1207, 1223) is misplaced. Defendants Meliana Denikov, Boban Sarov, and Lela Sarov were convicted of burglary and conspiracy to commit theft. There is nothing improper about being convicted of both offenses.

As the State correctly notes in its brief, the burglary alleged in count II was not the only criminal objective to

which the conspiracy was directed. (See *People v. Bolla* (1983), 114 Ill. *[page 9]* App. 3d 442, 449, 448 N.E.2d 996, 1002 (separate convictions for conspiracy and a crime committed pursuant to that conspiracy may stand if the proof shows that the object of the conspiracy was the commission of additional offenses).) Under the "Overt Acts" section of the information, the State alleged, in addition to the allegations contained in counts I and II (*i.e.*, the theft and burglary of the CC Food Mart in Greenville), nine additional overt acts committed in furtherance of the conspiracy. The State adduced evidence of these additional acts at trial. Consequently, the State established that the object of

the conspiracy was not limited to the CC Food Mart in Greenville.

Defendants Meliana Denikov, Boban Sarov, and Lela Sarov further argue that their multiple convictions for burglary and conspiracy to commit theft cannot stand because both convictions are premised upon the same physical conduct. (See *People v. Lee* (1993), 247 Ill. App. 3d 505, 510, 617 N.E.2d 431, 435 (a criminal defendant may not be convicted of more than one offense carved from a single physical act); *People v. Brown* (1976), 40 Ill. App. 3d 562, 565, 352 N.E.2d 15, 18 (same).) This argument is meritless. As previously discussed, the defendants' convictions for burglary were based upon their actions at the CC Food Mart in Greenville. Although the

defendants' conduct at the CC Food Mart in Greenville was part of the conspiracy, defendants' conspiracy convictions were based upon *additional conduct* at other convenience and grocery stores as enumerated in the overt acts section of the information. The bottom line is that defendants' convictions for conspiracy were *[page 10]* not based solely upon the same physical conduct as their convictions for burglary.

II. *Propriety of the Consecutive Sentences Imposed Upon Meliana Denikov, Baban Sarov, and Lela Sarov*

Having already determined that defendants' convictions for burglary and conspiracy to commit theft were not based upon the same physical conduct, we reject defendants' repackaged argument that their consecutive sentences were

improper because the offenses constituted a single course of conduct. Thus, section 5-8-4(a) of the Unified Code of Corrections (730 ILCS 5/5-8-4(a) (West 1992)), which prevents a court from imposing consecutive sentences for offenses "which were committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective ***," is inapplicable.

In *People v. Bale* (1993), 155 Ill. 2d 188, 613 N.E.2d 740, defendant pleaded guilty to three counts of criminal sexual assault, all of which involved the same victim. Our supreme court held that the defendant's offenses were not committed as part of a single course of conduct because "[t]hey were

separate events, committed several days apart, with substantial interruptions in time." *Bole*, 155 Ill. 2d at 194, 613 N.E.2d at 743; see also *People v. Bell* (1994), 259 Ill. App. 3d 572, 573, 630 N.E.2d 1335, 1336 (no single course of conduct found where the offenses were committed against different victims at different times and in different places).

In the case at bar, evidence was introduced at trial that the *[page 11]* defendants, as part of their conspiracy, committed the following additional acts:

(1) on February 22, 1993, at approximately 3 p.m., the defendants attempted a diversion theft at the I.G.A. grocery store in Casey, Illinois;

(2) on February 22, 1993, at

approximately 5:30 p.m., the defendants conducted diversionary tactics at the Home Grown Grocery Store in Odin, Illinois, where some money and a co-owner's purse were later discovered missing;

(3) on February 23, 1993, at approximately 8:45 to 8:50 a.m., the defendants were video-taped at a CC Food Mart in O'Fallon, Illinois, again attempting a diversion theft;

(4) on February 23, 1993, the defendants attempted a diversion theft at the Sanders AG Supermarket in Freeburg, Illinois; and

(5) on February 23, 1993, at approximately 3 p.m., the defendants conducted diversionary tactics at a Shell Station in Arcola, Illinois,

resulting in a high-speed car chase with the station's co-owner in which the defendants drove the wrong way on an interstate exit ramp.

It is evident that these additional acts were separate events committed over a two-day span. Moreover, these acts were committed against different victims at different times and at different locations. We therefore reject defendants' contention that their conduct constituted a single course of action.

III. *Sufficiency of the Evidence*

Defendants assert that the evidence is insufficient to support *[page 12]* their convictions. We disagree.

When a court of review is presented with a challenge to the sufficiency of

the evidence, it is not the function of that court to retry the defendant(s). (*People v. Collins* (1985), 106 Ill. 2d 237, 261, 408 N.E.2d 267, 277.) The reasonable doubt test is applied in reviewing the sufficiency of the evidence in all criminal cases, whether the evidence is direct or circumstantial. (*People v. Pintos* (1989), 133 Ill. 2d 286, 291, 549 N.E.2d 344, 346.) To determine whether a defendant has been proven guilty beyond a reasonable doubt, we ask whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (People v. *Hobley* (1994), 159 Ill. 2d 272, 313, 637

N.E.2d 992, 1010.) We will examine the evidence separately as it relates to the burglary and conspiracy convictions.

A. *The Conspiracy Convictions*

To convict a defendant of conspiracy, the State must prove: (1) an intent to commit an offense; (2) an agreement with another to commit the offense; and (3) the commission of an act in furtherance of the agreement by a coconspirator. (720 ILCS 5/8-2 (West 1992); *People v. Adams* (1992), 238 Ill. App. 3d 733, 739, 606 N.E.2d 579, 583.) The State is not required to prove that the conspirators actually met and entered into a specific agreement. (*Adams*, 238 Ill. App. 3d at 739, 606 N.E.2d at 583.) A conspiracy agreement can be by words, acts, or understanding.

(*Adams*, 238 *[page 13]* Ill. App. 3d at 739, 606 N.E.2d 583; see also *People v. Melgoza* (1992), 231 Ill. App. 3d 510, 521, 595 N.E.2d 1261, 1270 (existence of conspiracy agreement may be inferred from all surrounding facts and circumstances including the acts of the accused).) Additionally, through circumstantial evidence, conspiracy can be proven by showing a common criminal purpose. (*Adams*, 238 Ill. App. 3d at 739, 606 N.E.2d at 583.) "Because of the clandestine nature of conspiracy the courts have permitted broad inferences to be drawn from the circumstances, acts, and conduct of the parties." (*Melgoza*, 231 Ill. App. 3d at 523, 595 N.E.2d at 1272.) Conspiracy is a crime regardless of whether the purpose of the

conspiracy is accomplished. *Melgoza*, 231 Ill. App. 3d at 521, 595 N.E.2d at 1270.

The thrust of defendants' argument is directed towards showing that nothing was stolen from some of the stores or that there was no direct evidence of the defendants actually taking anything from the stores where money was reported missing. This line of argument would be more appropriate if the defendants were challenging convictions for theft or attempted theft. However, this is not the case. Defendants were convicted of conspiracy, which is a crime whether or not the object of the conspiracy is accomplished. *Melgoza*, 231 Ill. App. 3d at 521, 595 N.E.2d at 1270.

We think the State produced

sufficient evidence to prove defendants guilty of conspiracy beyond a reasonable doubt.

John Kuznikov, defendant Silva Kuznikov's then 13-year-old son, testified that he and the defendants travelled around the *[page 14]* Southern Illinois area in February of 1992. John was shown various still photographs which were taken from the security videotape of the CC Food Mart in O'Fallon, Illinois. He identified Meliana Denikov, Silva Kuznikov, Liza Kuznikov, Toma Kuznikov, Antal Korotkov, and Lela Sarov as the people in the photographs. John also testified that one of the cars used by the defendants belonged to Boban Sarov and the other belonged to Toma Kuznikov. John was

shown a group of photographs taken from the security camera of another CC Food Mart in Greenville, Illinois. He identified Meliana, Boban, and Lela as the people in the photographs. John testified that the other defendants were probably outside the store.

The State also established that the car registered to Boban had license plate number XXT 993, and that the car registered to Toma had license plate number XXT 250. Scott Tadlock, a witness who lived in his grandparents' home behind the Home Grown Grocery store in Odin, Iliinois, testified that on February 22, 1992, he was in his grandparents' yard when he observed several people running towards a black car parked in the back of the alley

behind the store. Scott identified People's Exhibit #8 (a photograph of Boban's black car) as the car he had seen on February 22, 1992. Scott testified that the car he saw in the alley had license plate number XXY 993, which is very close to the XXT 993 license plate number on Boban's car.

Michael Stephen, a clerk at the IGA store in Casey, Illinois, testified that on February 22, 1992, at approximately 3 p.m., he *[page 15]* noticed a group of people enter the store. Michael testified that Meliana approached him in the third aisle of the store and proceeded to ask him questions about canned vegetables for approximately five to ten minutes. He further testified that Meliana often repeated questions.

When he started to walk towards the front of the store, where the office is located, Meliana continued to ask him questions. Michael testified that after Meliana left the store, he went to the office and discovered that a money bag was gone. At trial, it was stipulated that $711.00 was taken from the store.

Michael Rogers, a stock boy at the Casey IGA, testified that on February 22, 1992, at approximately 3 p.m., he observed a group of people enter the store. Michael identified Boban Sarov as the man he and another stack boy were talking to outside the store. Michael testified that Boban, who claimed to be having automotive trouble, asked if there were any garages in town. Michael further testified that Boban rephrased

the question several times and then, after engaging in conversation about the weather, eventually returned to asking questions about repairing his car.

Kathryn Beasley, co-owner of the Home Grown Grocery Store in Odin, Illinois, testified that she was working at the store by herself on February 22, 1992. Kathryn testified that at approximately 5:30 p.m. two cars, one black and one white, pulled up and parked by the sides of the store such that she could hardly see the cars. Kathryn further testified that a group of nine to ten people then entered the store. Kathryn observed that two women in the *[page 16]* group "walked right straight to the back [of the store] where the money was kept." Kathryn

stated that the office door was not locked.

Kathryn testified still further that a chubby boy named John, who appeared to be about 12 years old, stayed up in the front of the store and asked her questions about shorts. Kathryn also testified that a heavy-set girl in a red blouse pulled out some change and asked her to ccunt it. As she was counting the monev, Kathryn was unable to see the office because "[t]hey blocked [her] view." Kathryn testified that because the other individuals in the group "were going all over the store," she was unable to watch them all. Lastly, Kathryn testified that the group left the store together "pretty fast."

Franklin Beasley, Kathryn's husband, testified that on February 22, 1992, at approximately 8 p.m., he went to his store to do the daily bookkeeping and discovered that $1,035.00 was missing.

Richard Sanders, the owner of Sanders AG Supermarket in Freeburg, Illinois, testified that on February 23, 1992, he was at the meat counter when a group of "eight people [came in and] fanned all over the store." Richard described these individuals as being dark-skinned people who looked Greek or Albanian. Richard testified that a woman, who he identified in court as Meliana, approached him at the meat counter and asked him questions about an unusual variant of Swiss cheese.

According to Richard, he "realized that she was trying to get [his] attention and [he] was looking around [when] she instantly selected another item and *[page 17]* started asking me questions about it ***." Richard testified that he became alarmed when he saw another woman in the group talking to his checkout clerk at the front of the store. When Richard started walking towards the front of his store, Meliana "grabbed [his] arm [and] said, oh, wait a minute. I want you to get cereal for me off the shelf in the center aisle."

Richard made an in-court identification of Boban as one of the people he saw in his store. Richard also identified Antal Korotkov as another person who was in his store.

Richard testified that Antal, who was not doing any shopping, was "looking all over [the store]" and "making a lot of observations." Richard further testified that Antal was looking at the walls in the back of the store where there are no products displayed. Richard testified still further that these people left as a group and proceeded to get into two cars Richard was able to get the license plate number (XXT 993) of Boban's black car.

Norma Harshbarger, who operates a Shell Station in Arcola, Illinois, with her husband, Paul, testified that on February 23, 1992, at approximately 3 p.m., she and her husband were in their office (located in the back of their business) counting money from the

previous day when a young woman opened the office door and asked where the restrooms were. Norma testified that this was unusual because signs were posted all over the place telling people where the restrooms are located. Norma also testified that it was unusual because most people ask the cashier where the restrooms are located. Trying to be polite, Norma got up and led the young woman *[page 18]* out into the convenience store to show her where the bathroom was. Norma testified:

> "When we got out there she lost interest in the bathroom and walked over to the sunglass display and started asking me questions about the sunglasses."

When Norma came into the

convenience store area with the young lady, she observed several men also in the store and a young boy who appeared to about 12 or 13 years old. Next, Norma saw her husband and another lady come out into the store area. When Norma turned to go back to the unattended office, her husband started running back towards the office. Norma testified:

> "[E]verybody seemed to just go out of the store and [my husband] said wait a minute, and the next thing I knew *** people were jumping into this [black] car and [my husband] was running out and then he jumped into our car ***."

Norma additionally testified that $1560 was missing from a deposit bag

that was kept in a file cabinet, which had been pried open. Lastly, Norma was able to identify Meliana, Toma, Boban, and Silva as being in her store on February 23, 1993.

Paul Harshbarger's testimony was nearly identical to that of his wife. Paul testified that after his wife had left the office area to show the young lady were the restrooms were, another woman, who did not knock on the office door, came into the office and asked him about soda pop. Paul later identified this second woman as Meliana. According to Paul, Meliana "acted like she really *[page 19]* didn't understand me and she kept asking for pop *** pop without soda in it[.]" Paul testified that he followed the woman into the store area,

whereupon he noticed that the store was full of people:

> "I observed lots of people in there. *** I was shocked and I felt really intimidated almost. It was just like, why are all these people in there and they are just standing. There was three to four men standing right by the door. *** They were almost crowding me when I walked through with the girl, and she was asking me to go clear over by the pop coolers *** I would say [there were] like ten to eleven people in the store ***."

Additionally, Paul testified that Meliana repeatedly asked him questions about soda pop. Paul also testified that he believed his cashier's view of

the office was blocked by people standing at the register. Paul testified that as the last lady was leaving his store, he went out the door and said "hey, wait a minute," but the lady ran as fast as she could and jumped into a car. Paul testified that he was unable to get a license plate number because the car "pulled out real fast" and left the parking lot at a high rate of speed.

At trial, Paul identified People's Exhibit #10 (a photograph of a silver car) as one of the cars the people had fled in. Paul also made an in-court identification of Silva, Boban, Meliana, and Toma. Paul testified that one of the cars had license plate number XXT 250. Paul also testified that both cars

appeared to leave together. Paul testified that he got into his own car and gave *[page 20]* chase, reaching speeds of up to 115 miles per hour. Finally, Paul testified:

> "I pursued the car with all those people in it *** [for] about five miles *** and I was trying to get them to stop and they made a big U-turn down the ditch ***. Then he took off. I followed him *** [and got] his plate [number] ***. He tried to get on the Interstate [but] *** I wasn't going to let him get on. Then he ended up going the wrong way down the off ramp and got on 57 and headed south."

Other evidence introduced at trial included a videotape from the CC Food

Mart store in O'Fallon, Illinois, which shows the defendants in the store.

We have examined the entire record in this case and conclude that the evidence introduced against the defendants is sufficient to sustain their conspiracy convictions. The defendants' method of operation was a diversionary scheme in which the defendants would enter a store in a large group (five to eleven people) and fan out over the store. While one or two of the defendants asked questions of store employees, other defendants would enter the office area of the stores. The evidence shows that defendants' tactics made it impossible for the few store employees on duty in a given store to keep an eye on all of the defendants.

Other evidence shows that the defendants would position themselves so as to prevent store employees from seeing the store's office area. The testimony of Paul Harshbarger, co-owner of a Shell Station in Arcola, Illinois, *[page 21]* established that defendants took off in their automobiles at a high rate of speed and attempted to elude him during a high-speed chase. Evidence of flight may be considered as circumstantial evidence tending to show consciousness of guilt. See *People v. Durham* (1993) 252 Ill. App. 3d 88, 94, 623 N.E.2d 1010, 1014; *People v. Foster* (1990), 198 Ill. App. 3d 986, 993, 556 N.E.2d 1214, 1219.

Looking at all the evidence in the light most favorable to the prosecution,

we conclude that a rational trier of fact could have found the defendants guilty of conspiracy beyond a reasonable doubt. *People v. Hobley* (1994), 159 Ill. 2d 272, 313, 637 N.E.2d 992, 1010.

B. *The Burglary Convictions*

Barbara Meyer, assistant manager at the CC Food Mart in Greenville, Illinois, testified that on February 23, 1992, at approximately 12:20 p.m., she was working alone when a group of about five people entered the store and spread out. Barbara testified that the men in the group had on football jackets, and because it was unseasonably warm outside, she became concerned that the men would shove stuff inside the jackets. Barbara testified that Meliana, whom she identified in court,

approached the cash register and "kept asking me if any of the ice cream did not have sugar and I kept telling her it all had sugar. She repeatedly would ask me that and if I would start to walk away she would start asking me again." Barbara further testified that a boy approximately 12 years old also asked her about ice cream. Barbara testified that during this time, she was unable to see the office. *[page 22]*

Barbara additionally testified that when she attempted to leave the cash register area, Meliana became more insistent in asking "stupid questions" about sugar-free ice cream. Barbara also testified that the group of people left without purchasing anything. Lastly, Barbara testified that the

filing cabinet had been pried open and that $4300 in cash and $890 in checks were missing. A videotape from the store's security cameras was played in court. In describing what is on the tape, Barbara stated that two members of the group, a woman in a black top, and a man in baseball jacket, can be seen in an aisle that leads to the office. According to Barbara, after the woman and man temporarily disappear from view, the two can be seen walking down the aisle away from the office.

When all the evidence is viewed in the light most favorable to the prosecution, we think that Boban, Meliana, and Lela were proven beyond a reasonable doubt to have entered the CC Food Mart in Greenville with the intent

to commit a theft therein. (See *In re Velez* (1979), 75 Ill. App. 3d 399, 400, 394 N.E.2d 525, 526 (the gist of the offense of burglary is the entering of a building with felonious intent).) The fact that the defendants were not convicted of theft is immaterial given that the State is not required to prove that defendants actually took anything in order to sustain a burglary conviction. (*Velez*, 75 Ill. App. 3d at 400, 394 N.E. 2d at 526.) The intent to commit theft "must ordinarily be proved circumstantially by inferences drawn from defendant's conduct." *Velez*, 75 Ill. App. 3d at 400, 394 N.E.2d at 526.

[page 23]

IV. *Was Evidence Introduced Against Boban Sarov in Violation of His Fourth Amendment Rights?*

Defendant Boban Sarov argues that his conviction must be reversed because the trial court considered improperly obtained evidence. Specifically, defendant complains that the trial court should have suppressed Officer Danny Seibel's statement that defendant had a large roll of money in his possession. Defendant further argues that all statements he made to Officer Seibel should have been suppressed. The only statements defendant made to Officer Seibel were that he had been in St. Louis for the weekend, had stayed in a hotel, was on his way home, and had stopped at the Sanders Market in Freeburg.

Even assuming, *arguendo*, that defendant was the subject of an unlawful

detention, the admission of any "improper evidence" was without question harmless error. The admission of illegally obtained evidence in a criminal trial, following the erroneous denial of a motion to suppress, is subject to the harmless error rule. (See *People v. Hobson* (1988), 169 Ill. App. 3d 485, 493, 525 N.E.2d 895, 900; *People v. Stokes* (1981), 102 Ill. App. 3d 909, 915, 430 N.E.2d 370, 374.) We cannot see how defendant was prejudiced by Officer Seibel's testimony regarding the roll of money or the statements defendant made. The fact that defendant was carrying a large roll of money is not prejudicial given that neither a burglary conviction nor a conspiracy conviction requires proof that anything

was stolen. Defendant's statement that he had *[page 24]* been at the Sanders AG Supermarket is merely cumulative since Richard Sanders, the store's owner, identified defendant in court. As for the remaining statements, we do not understand, nor does defendant say, how these statements could possibly have prejudiced him.

The judgment of the circuit court of Bond County is hereby affirmed.

Affirmed.

WELCH, J., with CHAPMAN and LEWIS, JJ., concurring.

APPENDIX B

No. 5-94-0098

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MELIANA DENIKOV, et al., Defendants-Appellants.	)	Appeal from the Circuit Court of Bond County. No. 92-CF-23

O R D E R

This cause has been considered on defendants' petition for rehearing, and the court being advised in the premises:

IT IS THEREFORE ORDERED that defendants' petition for rehearing shall

be, and the same hereby is, denied.

F I L E D

APR 28 1995

LOUIS E. COSTA

CLERK APPELLATE COURT 5th DIST.

APPENDIX C

SUPREME COURT OF ILLINOIS

WEDNESDAY, OCTOBER 4, 1995

THE FOLLOWING CASES ON THE LEAVE TO APPEAL DOCKET ARE DISPOSED OF AS INDICATED:

* * *

No. 79088 - People State of Illinois, respondent, v. Meliana Denikov et al., petitioners. Leave to appeal, Appellate Court, Fifth District. (5-94-0098)
Petition for leave to appeal denied.